

**BOISE, MONDAY, NOVEMBER 10, 2008 AT 8:50 A.M.**

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**KENNETH E. THOMSON**

**Plaintiff/Appellant,**  
**v.**

**CRAIG OLSEN, M.D.**

**Defendant/Respondent.**

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**Docket No. 34185**

Appeal from the Fourth Judicial District of the State of Idaho, Ada County.  
Hon. Ronald J. Wilper, District Judge.

Morrow Dinius, Nampa, for appellant.

Hall, Farley, Oberrecht & Blanton, Boise, for respondent.

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Kenneth Thomson (“Appellant”) elected to have surgery to remove a cyst in his chest. Dr. Craig Olsen (“Respondent”) performed the surgery and allegedly damaged Appellant’s phrenic nerve, resulting in elevation and paralysis of Appellant’s left hemidiaphragm. Appellant filed a complaint alleging that Respondent committed medical malpractice. The jury returned a verdict for Respondent, concluding that he did not breach the applicable standard of care in his treatment of Appellant. The district court entered an order denying Appellant’s motion for a new trial. Appellant appeals on the grounds that the district court erred by: 1) allowing Respondent’s counsel to question jurors about sympathy during voir dire; 2) allowing Respondent’s undisclosed witness to testify; 3) excluding email evidence; 4) admitting consent form evidence; and 5) allowing Respondent to present the “known complication” defense.

**BOISE, MONDAY, NOVEMBER 10, 2008 AT 10:00 A.M.**

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**BRENDA BORAH,**

**Plaintiff-Respondent,**

**v.**

**DANA MC CANDLESS, d/b/a THE GREAT  
SNAKE RIVER LOG HOME COMPANY,**

**Defendant-Appellant.**

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**Docket No. 34756**

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Honorable Kathryn A. Sticklen, District Judge.

Dunn Law Offices, Rigby, for appellant.

Gery W. Edson, Boise, for respondent.

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This appeal arises from a bench trial concerning a contract for the sale of logs.

In March 2004, Brenda Borah contacted the Great Snake River Log Home Company, owned by Dana McCandless, to discuss the possibility of purchasing logs to build a cabin on a lot she owns in Camas County, Idaho. McCandless indicated one truck load should be sufficient to deliver the entire cabin package and that he could deliver the cabin package to her in July 2004 if she ordered it by the end of April.

McCandless sent Borah a pre-printed contract dated April 29, 2004, with a stated price of \$27,100. The contract required an initial deposit of \$16,975, and the terms were FOB Grangeville, Idaho, with Borah to pay for shipping to the Camas County site. No date for delivery was set in the written contract.

On June 3, 2004, McCandless accepted a check from Borah for the full amount of the deposit. On or about June 3, 2004, McCandless indicated that he would probably deliver the logs in early August 2004, but possibly sooner. McCandless, however, delivered three loads of logs, on September 17, 2004, September 23, 2004, and October 30, 2004. The logs from these three deliveries left Borah well short of the total logs contemplated under the contract, and they were only worth \$12,986.32, as opposed to the \$16,975 Borah had already given McCandless for a down payment.

After the October 30, 2004 delivery, the weather prevented Borah from completing construction of the cabin until the following spring. Borah had to winterize the part of the cabin which had been assembled at a cost of \$632.79.

In November 2004, Borah proposed a final delivery date of June 1, 2005 for the remaining logs. McCandless responded in March 2005 and indicated he could deliver the

remaining logs by May 15, 2005. McCandless failed to deliver on May 15, 2005, and the parties continued to discuss delivery dates. McCandless testified that he was willing and able to make final delivery by the end of June 2005 but declined to do so after receiving a letter from Borah's attorney on June 24, 2005. Borah, however, rented equipment in early July 2005 to continue building the log home. Borah's attorney sent another letter to McCandless dated July 21, 2005, demanding final delivery. Still McCandless did not deliver and, in August 2005, Borah entered into a contract with Western Spirit Log Homes to purchase the logs necessary to construct the remainder of the cabin. Borah filed suit on August 31, 2005.

The district court found that McCandless had breached the contract without excuse by failing to deliver the logs within a reasonable time. The court found that the concept of cover applied and awarded Borah \$15,199.80 in cover damages. The court also awarded Borah damages for her costs to winterize the partially built cabin, as well as to rent equipment in July 2005. Finally, the court found Borah was the prevailing party and awarded her costs and attorney fees. McCandless timely appeals to this Court.

**BOISE, MONDAY, NOVEMBER 10, 2008 AT 11:10 A.M.**

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**REED TAYLOR, DALLAN TAYLOR, and )  
R. JOHN TAYLOR, )**

**Plaintiffs-Counterdefendants- )  
Respondents, Cross-Appellants, )**

**v. )**

**THOMAS MAILE, IV and COLLEEN )  
MAILE, husband and wife, THOMAS )  
MAILE REAL ESTATE COMPANY, and )  
BERKSHIRE INVESTMENTS, LLC, )**

**Defendants-Counterclaimants- )  
Appellants-Cross-Respondents, )**

**Docket No. 33781**

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THEODORE L. JOHNSON REVOCABLE )  
TRUST, )**

**Plaintiff-Counterdefendant- )  
Respondent-Cross-Appellant, )**

**v. )**

**THOMAS MAILE IV and COLLEEN )  
MAILE, husband and wife, and )  
BERKSHIRE INVESTMENTS, LLC, )**

**Defendants-Counterclaimants- )  
Appellants-Cross Respondents. )**

Appeal from the District Court of the Fourth Judicial District of the State  
of Idaho, Ada County. Hon. Ronald J. Wilper, District Judge.

Dennis M. Charney, Eagle and Law Offices of Thomas G. Maile, Eagle,  
for appellants.

Clark & Feeney, Lewiston, for respondents.

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Appellants Thomas G. Maile, IV, Colleen Maile, Thomas Maile Real Estate  
Company, and Berkshire Investments, LLC (collectively the Mailes) appeal from a  
district court order granting summary judgment to Respondents Reed Taylor, Dallan

Taylor, and L. John Taylor (collectively the Taylors). The Taylors cross-appeal the district court's order denying their request for attorney fees.

Thomas Maile provided legal representation to Theodore L. Johnson, advising him on the creation and administration of the Theodore L. Johnson Revocable Trust (the Trust). The Trust owned approximately forty acres of property near Eagle, Idaho. In May 2002, a third party offered to buy the land for approximately \$400,000. Maile advised Johnson to reject this offer, but two months later Thomas and Colleen Maile submitted an earnest money agreement to purchase the property on terms and for a price similar to the rejected offer. Johnson accepted the offer and executed the agreement on behalf of the Trust on July 25, 2002.

Johnson passed away before the sale transaction could be closed. Approximately a week after his death, the successor trustees, Beth and Andrew Rogers, closed the sale. They executed the warranty deed conveying the forty acres to Berkshire Investments, LLC (Berkshire), formed by Thomas and Colleen Maile, over the objections of the Taylors, who are residual beneficiaries of the Trust. Berkshire paid the balance of the purchase price and obtained a release of the trust deed in January 2004.

On January 23, 2004, the Taylors, as beneficiaries, filed a complaint against the Mailes, alleging two breach of fiduciary duty claims and negligence. The Mailes moved to dismiss the complaint, and the district court granted their motion on April 23, 2004. The Taylors appealed and, in December 2005, the Idaho Supreme Court issued its opinion in *Taylor v. Maile*, 142 Idaho 253, 127 P.3d 156 (2005). The Court affirmed the dismissal of the two breach of fiduciary duty claims, but reversed the dismissal of the negligence claim and remanded that claim to the district court.

While the appeal was pending, the beneficiaries executed a Disclaimer, Release and Indemnity Agreement (Disclaimer) in June 2004, which nominated and appointed the Taylors as successor trustees. After executing the Disclaimer, the Taylors, as trustees, filed another lawsuit against the Mailes. The two cases were consolidated in September 2004.

After allowing the Taylors' to amend their complaint to comply with the Idaho Supreme Court decision, in May 2006 the district court granted the Taylors' motion for summary judgment on the remaining negligence claim. On June 7, 2006, it entered judgment on that claim quieting title to the property in the Trust and dismissing the Mailes' counterclaims and defenses. Later, the court amended the judgment to clarify that the property is in a constructive trust, that Berkshire is entitled to repayment of the purchase price, and that the Mailes' counterclaim for unjust enrichment was the only remaining issue. In October 2006, the district court denied the Mailes' claim for unjust enrichment, as well as the Taylors' request for attorney fees.

On appeal, the Mailes assert that the Taylors lacked standing to pursue their claims. They also argue that the district court erred in granting summary judgment because Beth Rogers did not have a conflict of interest requiring court approval of the sale, and even if she did, her actions were reasonable and prudent and should be exempted from the court approval requirement. The Mailes also argue that Berkshire was a bona fide purchaser, so the imposition of a constructive trust was improper.